BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRI L. MACK	)	
Claimant	)	
	)	
VS.	)	
	)	
GOODYEAR TIRE & RUBBER COMPANY	)	
Respondent	)	Docket No. 1,041,706
	)	
AND	)	
	)	
LIBERTY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 14, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. John J. Bryan, of Topeka, Kansas, appeared for claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a compensable injury and ordered respondent to pay claimant temporary total disability compensation and medical treatment with Dr. Douglas Jones and Dr. William Leeds.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 6, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that inhalation of dust is not an accidental injury and, therefore, claimant did not suffer an accidental injury that arose out of and in the course of her employment at respondent. Further, respondent argues that claimant did not suffer a physical injury and is therefore unable to support a claim for a mental injury or disorder. Accordingly, respondent requests the Board reverse the Order of the ALJ and find that claimant failed to sustain her burden of proof that she has a compensable claim.

Claimant argues that she met her burden of proving she suffered a pulmonary injury that arose out of and in the course of her employment with respondent and that as a natural and probable consequence of her pulmonary condition, she developed psychological problems.

The issue for the Board's review is:

(1) Did claimant suffer an accidental injury that arose out of and in the course of her employment with respondent?

(2) If so, are claimant's psychological problems a direct and natural consequence of her accidental injury?

FINDINGS OF FACT

Claimant began working for respondent on June 14, 1993. In 1996 she was transferred to a department in the plant where she was required to grind and buff tires, which created dust and particles of rubber. She wore no type of breathing protection.

In February 2005, claimant saw her family physician for a physical. She did not go in with complaints of breathing problems. While she was there, she and her doctor discussed problems she was having with bronchitis. She was counseled to quit smoking and was put on an inhaler and other medication. In the spring of 2005, she was given permanent restrictions to work in a climate-controlled, dust-free area and was moved to another area of the plant. Then, in December 2005, she was hospitalized and was treated by a pulmonologist, Dr. Malik. Her care was eventually transferred to Dr. William Leeds, another pulmonologist, who believes there is a workplace connection to her bronchial hyperresponsiveness.

In July or August 2006, claimant injured her shoulder and was off work until May 27, 2008. On that day, she went back to the plant and had some pulmonary tests. While she was being tested, she started having a hard time breathing, and her boyfriend was sent to get her medication. She described having an anxiety attack and said she went blank and apparently tried to take too many pills.

The next day, May 28, claimant went in to work. At the beginning of her shift, she had another pulmonary test and then walked through the Banbury Department on the way to the lab, where she had been assigned to work within her restrictions. As she entered the Banbury Department, she said the smell was terrible there was a "[l]ot of black and stuff in the area."[1] She then went to the dispensary and told them she needed to go home because she was having a hard time breathing. When she got out to her car, she used her

[1] P.H. Trans. at 19.

inhaler. She has not returned to work for respondent or anywhere else since May 28, 2008.

Claimant described her symptoms as shortness of breath, tightness in her chest, coughing, and wheezing. When she cannot breathe, she develops a panic attack. Before developing her breathing problems, she had never had an anxiety or panic attack. And until 2005, claimant had not seen a doctor for any sort of a breathing problem, and she had not seen a psychiatrist or any sort of mental health professional.

Claimant testified that she had smoked from one to two packs a day since she was 16 years old. When she was told by her personal physician to stop smoking, she quit for awhile and then got stressed and started again. She has tried to quit from three to six times since February 2005. She would quit for two or three months and then start back up. She believes she was not smoking about half the time since February 2005. She quit again about two weeks before the preliminary hearing.

Claimant received accident and sickness benefits from respondent for her psychiatric problems, although she is claiming they are work related. She started seeing Dr. Douglas Jones about the first of July, 2008. Dr. Jones has opined that claimant suffers from major depression and that her mental health problems were caused or worsened by her pulmonary symptoms and/or potential loss of employment.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the

[2] K.S.A. 2008 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2008 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
>
> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where

[4] *Id.* at 278.

> it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Logsdon*,[5] the Kansas Court of Appeals stated:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Casco*,[6] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

In *Love*,[7] the Kansas Court of Appeals stated:

> In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq*., the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury. Overruling *Ruse v. State*, 10 Kan. App. 2d 508, 708 P.2d 216 (1984).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

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[5] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006).

[6] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[7] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2008 Supp. 44-555c(k).

ANALYSIS

In her Application for Hearing, claimant alleged that her exposure at work from June 14, 1993, through May 28, 2008, to "rubber, rubber dust or other chemicals or compounds or dust in the workplace"[10] caused her breathing problems and anxiety attacks. These dates encompass the entire time claimant worked at Goodyear. Respondent acknowledges that the inspection and repair department where claimant worked from 1996 until the spring of 2005 required grinding tires. This caused dust from the rubber particles.[11] Respondent contends, however, that claimant was not exposed to dust at work after the spring of 2005. Her next job was in a dust-free, controlled air environment. Furthermore, claimant was off work for a shoulder injury from August 25, 2006, until May 28, 2008, and respondent offered to return claimant to an accommodated job in the lab. But in order to do the lab job, claimant said she had to go to the Banbury area. Respondent disputes that claimant could have suffered any injury or occupational disease by a single day of exposure on May 28, 2008. However, this argument ignores claimant's contention that she suffered a series of exposures each and every working day.

Respondent further argues that exposure to dust is not an accidental injury, citing *Watson*.[12] But in *Burton*,[13] where the claimant was also a smoker and who was exposed to paint fumes and dust over a period of time, the court held that his adult-onset asthma and bronchitis conditions were compensable as occupational diseases. More recently, in *Casey*,[14] the claimant's allergic reaction to her exposures to mold and allergens was held compensable as an injury by accident. The Court of Appeals noted that the definition of accident is not limited to injuries caused by a manifestation of force. In *Hall,*[15] the Board found claimant's bronchitis condition was caused by a series of accidents rather than an occupational disease.

Dr. Leeds attributes claimant's bronchial hyperresponsiveness to her work and imposed restrictions that require "a dust free, chemical free, climate-controlled work area."[16] Dr. Tietze recommended the same restriction. On June 9, 2008, Dr. Leeds issued

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[10] Form K-WC E-1, Application for Hearing, filed August 27, 2008.

[11] Respondent's brief at 3 (filed December 9, 2008).

[12] *Watson v. International Milling Co.*, 190 Kan. 98, 372 P.2d 287 (1962).

[13] *Burton v. Rockwell International*, 266 Kan. 1, 967 P.2d 290 (1998).

[14] *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 114 P.3d 182, *rev. denied* 280 Kan. 981 (2005).

[15] *Hall v. Martin Logan, Ltd.*, No. 1,021,353, 2008 WL 5484141 (Kan. WCAB Dec. 17, 2008).

[16] P.H. Trans., Cl. Ex. 1 at 3.

a report that stated he did not want claimant to return to work at that time. Likewise, on June 2, 2008, Dr. Tietze issued a report that showed he took claimant off work beginning May 28, 2008.

Respondent disputes claimant's entitlement to psychological treatment because she has not suffered any physical injury. Absent a physical injury or trauma, mental injuries or disorders are not compensable. Again, respondent argues that exposure to and breathing dust is not a trauma. Claimant relates her panic attacks and anxiety attacks to her fear of being unable to breath at work if exposed to dust and relates her depression to her loss of income if she cannot return to work. Claimant's bronchial condition is a physical injury. Her panic and anxiety attacks and depression are directly related to that physical injury.

Dr. Jones, a psychiatrist, described claimant as having major depression which was made worse by her pulmonary symptoms and potential loss of employment. He also opined that claimant's symptoms will diminish or resolve if she can reduce the frequency of her asthma attacks. But at this time Dr. Jones does not recommend that claimant return to work. Sherri Parker, claimant's psychotherapist, likewise does not believe claimant should return to work at this time.[17]

The opinions of Dr. Leeds, Dr. Tietze, Dr. Jones, and Ms. Parker are uncontradicted. Based on the record presented to date, this Board Member finds that the ALJ's Order should be affirmed.

CONCLUSION

(1) Claimant suffered a pulmonary injury by a series of accidents/exposures at work. She has suffered personal injury by accident arising out of and in the course of her employment with respondent.

(2) Claimant's psychological problems are a direct and natural consequence of her work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated November 14, 2008, is affirmed.

IT IS SO ORDERED.

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[17] *Id*., Cl. Ex. 4 at 2.

Dated this _____ day of February, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge